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HAROLD B. WILLEY,

Supreme Court of the United States

October Term, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant

v.

COMMONWEALTH OF VIRGINIA
Appellee

Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR THE APPELLEE

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OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is officially reported in Volume 194 of the Virginia Reports at page 757, and is also reported in Volume 75 of the Southeastern Reporter, 2nd Series, page 263. For text of the opinion, see page 48 of the printed transcript of record. The opinion of the State Corporation Commission has not yet been officially reported. For text of the opinion, see page 22 of the printed transcript of record.

GROUNDS OF JURISDICTION

The Appellants challenge the validity of § 58-547 of the Code of Virginia, 1950, alleging it is repugnant to the

Commerce Clause of the Federal Constitution. The appeal is pursuant to §1257(2) of Title 28 of the United States Code.

THE QUESTION PRESENTED

By this appeal the following question is presented:

1. Whether §58-547 of the Code of Virginia, 1950, imposes an *ad valorem* property tax on the value of the Corporation's property as a "going concern" as the State Corporation Commission and the Supreme Court of Appeals of Virginia have held or whether the section imposes a license tax which amounts to an unconstitutional regulation of interstate commerce.

STATEMENT OF THE CASE

A.

Preliminary Statement

This case is an appeal from the judgment of the Supreme Court of Appeals of Virginia affirming an order of the State Corporation Commission entered June 16, 1952, which order denied to the Appellants refund of certain taxes for the years 1950 and 1951. The taxes in question were assessed by the State Corporation Commission under the provisions of §58-547 of the Code of Virginia, 1950.

B.

The Case

Appellant, a Delaware corporation, operates interstate between all the forty-eight states of the United States and the District of Columbia and operates intrastate within all of the states except Virginia. The business of Appellant in Virginia has been confined solely to interstate business since the State Corporation Commission denied it authority to do an intrastate business by order dated April 8, 1929, in

Case No. 3900, reported at page 252 of the annual report of the Commission for 1929. This decision was sustained by the Supreme Court of Appeals of Virginia, 153 Va. 498, 150 S. E. 419 (1929), and by this Court, 282 U. S. 440 (1931). Following that decision, Appellant organized in Virginia a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, for the purpose of conducting an express transportation business in intrastate commerce in that state.

Since its organization, the Virginia Company has done exclusively an intrastate business in Virginia and has reported to the State of Virginia, has been assessed with and has paid annually all taxes on property owned by it and money used and employed by it as well as the tax imposed under § 58-547, based on its total gross receipts each year (R. 15, 45).

Since the organization of its Virginia subsidiary, Appellant has made the requisite reports to the State of Virginia, has been assessed with and has paid annually all taxes on property and money used by it in Virginia all of which was used by it exclusively in interstate commerce and, under protest, it has likewise made the requisite report, has been assessed with and has paid annually the tax imposed under § 58-547. Although this tax ostensibly has been assessed pursuant to § 58-547 or its antecedent sections of the Virginia Code which requires an apportionment of its total gross receipts, the amount of tax has been determined pursuant to informal understandings resulting from discussions with representatives of the State Corporation Commission.

The amounts of the various assessments annually made against Appellant since 1942 pursuant to this understanding have been accepted by the company and the tax paid thereon pursuant thereto under protest.

Following the decision in the *Spector case,* 340 U. S. 602 (1951), Appellant, by formal petitions filed with the Virginia State Corporation Commission, sought refunds for the taxes paid pursuant to § 58-547 for the years 1950 and 1951 in the amount of $70,665.68, and $66,454.71, respectively (R. 2, 6).

These petitions for refund raised the single question of the repugnancy of § 58-547 to the Commerce Clause of the Constitution of the United States by alleging that the license tax imposed by § 58-547 was "unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your petitioner to do an interstate business in this State, and constitutes a direct burden upon such commerce and a tax upon your Petitioner for the privilege of engaging therein, in contravention of the provision of Article I, Section 8, Paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States."

The Commission heard the petitions together and dismissed the 1950 petition on a jurisdictional point not pertinent to this appeal. With respect to the 1951 petition, it held that § 58-547 was a property tax on the intangible elements of value generated by the employment in business of the physical properties of express companies in the State and not a license or excise tax and was, therefore, not violative of the Commerce Clause of the Constitution of the United States when applied to Appellant, although engaged solely in interstate commerce in Virginia (R. 21, 31).

The decisions of the Commission on both petitions were appealed to the Supreme Court of Appeals of Virginia on a consolidated record.

The Virginia Court held that § 58-547 as applied to Appellant was not repugnant to the Commerce Clause of the

Federal Constitution since it was not a tax on the privilege of conducting an express business in Virginia but was a property tax levied on the element of value of Appellant's physical properties created by their employment in business in interstate commerce in Virginia (R. 51). The court's decision was applicable to the petitions for refund for both 1950 and 1951, rendering unnecessary a decision on the jurisdictional question upon which the Commission based its adverse decision on the petition for the 1950 refund.

Appellant is appealing from the decision of the Virginia Court on the constitutional question stated above.

OUTLINE OF ARGUMENT

Part one of the Argument is devoted to calling to the Court's attention the fact that, while it undoubtedly can inquire for itself as to the nature and effect of the tax in question, in view of the history of decisions in Virginia there is no occasion for this Court to disturb the ruling of the Virginia Court.

Part two deals with whether the tax in question is a property tax.

Properly apportioned gross receipts may be used as a measure of the going concern value of the property within a state engaged in interstate commerce. The prior decisions of the Supreme Court of Appeals of Virginia are uniformly to the effect that the nature and effect of such taxes in Virginia are that of an *ad valorem* property tax on going concern value. These rulings are justified both by the administrative interpretations and the obvious intention of the framers of the Virginia Constitution of 1902.

The tax in question is clearly not a license tax as it is not made a condition precedent to the doing of business in Virginia. The tax meets the tests laid down by this Court in that it is a part of a system established for taxing all of the

property of such corporations, it is the only tax levied on the going concern value, there is no possibility of multiplicity of taxation by the several states, and it is in lieu of other taxes. The tax is supported by *Memphis Natural Gas Co.* v. *Stone,* 335 U. S. 80, and the case is clearly distinguishable from *Spector Motor Service Inc.* v. *O'Connor, supra.*

ARGUMENT

I.

Should This Court Re-examine the Virginia Decisions?

The Appellee recognizes the power of this Court to determine for itself the nature and effect of a tax of the type here under consideration, but the Court is bound by the construction given to state statutes by state courts. *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs.,* 332 U. S. 495.

As will be developed later in the brief the Virginia Court determined the type of tax here in question to be a property tax in a case in which the *operation* of the tax was involved and where the constitutionality of the tax was not an issue. Under such circumstances this Court should not disturb the ruling of the lower court. It is one thing for this Court to ignore the *labels* applied by state courts, as was the case in each of the decisions cited by the Appellant, it is quite another for the Court to look behind the state court's decision as to the operation of the statute at the state level. The Virginia Court in *City of Richmond* v. *Commonwealth,* 188 Va. 600, 50 S. E. 2d 654 (1948), was not concerned with a constitutional question but was seeking to determine whether the locality could tax the property of a public service corporation at 100% of its actual value. The Court clearly determined that it could not do so and that the "going concern value" was the subject of the gross receipts tax. Since

it was the *operation* of the statute at the state level that was determined there, and since that operation makes this a property tax, it would appear that there is no occasion for this Court to disturb the finding of the Virginia Court.

II.

Section 58-547 Imposes a Property Tax on the Going Concern Value

A.

PROPERLY APPORTIONED GROSS RECEIPTS MAY BE MADE THE MEASURE OF GOING CONCERN VALUE

The Appellant contends that the "basic error" of the Virginia Court was its failure to recognize that a tax measured by gross receipts cannot measure the going concern value but that such could only be measured by a tax upon net profits (Brief of Appellant, p. 31).

We do not so understand the decisions of this Court. In the case of *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918), it is true, that the Court discussed the significant difference between a tax measured by gross receipts and one measured by net income. But it did so merely to point out that the latter did not have the tendency to discourage interstate commerce which might be present in the former. *The Court did not hold nor indicate that an ad valorem property tax measured by fairly apportioned gross receipts is invalid.* Indeed, this Court has repeatedly expressed itself to the contrary. In *Western Live Stock* v. *Bureau of Internal Revenue*, 303 U. S. 250 (1938), the Court, speaking through Mr. Justice Stone, said:

> "* * * Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229; Maine v. Grand

Trunk Railway, supra; Cudahy Packing Co. v. Minnesota, supra; United States Express Co. v. Minnesota, 223 U. S. 335, 32 S. Ct. 211, 56 L. Ed. 459, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair, Fargo v. Michigan, supra; Galveston, H. & S. A. R. Co. v. Texas, supra; Meyer v. Wells, Fargo & Co., supra, with which compare Wisconsin & M. R. Co. v. Powers, supra. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in Maine v. Grand Trunk Railway, supra; Ficklen v. Shelby County Taxing District, supra; American Manufacturing Company v. St. Louis, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084, or as a method of arriving at the fair measure of a tax substituted for local property taxes, Cudahy Packing Co. v. Minnesota, supra; United States Express Company v. Minnesota, supra; cf. Postal Telegraph Cable Co. v. Adams, supra; see McHenry v. Alford, 168 U. S. 651, 670, 671, 18 S. Ct. 242, 42 L. Ed. 614, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. * * * ." (303 U. S. 256)

As recently as the case of *Interstate Oil Pipe Line Company* v. *Stone*, 337 U. S. 662 (1949), this Court has approved the doctrine of *Maine* v. *Grank Trunk R. Co.*, 142 U. S. 217 (1891), which sustained a tax on an interstate railroad corporation which was "an annual excise tax measured by apportioned gross receipts for the privilege of exercising its franchises in this State" (337 U. S. 667).

Indeed, Mr. Justice Burton in the case of *Spector Motor Service, Inc.* v. *O'Connor, supra,* which is after all the case upon which the Appellant ultimately rests its case, felt it

necessary to point out that the decision of the Connecticut Court took the *Spector Case* outside the realm of decisions such as the *Interstate Case* of 1949, *supra* (340 U. S. 607).

Accordingly, it seems clear that the fact that the tax here involved is measured by apportioned gross receipts does not *per se* make it impossible to classify this tax as a property tax as the Appellant contends it does.

B.

THE HISTORY OF DECISIONS IN VIRGINIA

It is apparent from the brief of the Appellant that they regard the gross receipts taxes on railroad and steamships in Virginia as being so similar to the tax in question as to make administrative practices and judicial rulings with respect to such taxes applicable to this tax. We should, therefore, examine those rulings and decisions, for assuming *arguendo* that this Court will examine for itself the nature and effect of the tax here involved, as the Appellant urges, we take it that this Court will give no more, if not less, significance to the label given the tax by the Legislature than it will to the judicial determination of the nature and effect of the tax made by the highest court of the State. Indeed, in the *Spector Case, supra,* this Court accepted without question the construction placed on the tax by the Connecticut Court.

The Appellant has charged the Supreme Court of Appeals of Virginia with laying "the ground work for sustaining the gross receipts tax against the Appellant by assigning as an alternate ground for its decision [in *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. 2d 137] that the tax was levied on the augmentation in value of the physical assets of the taxpayer in Virginia resulting from their use as part of a going business" (Brief of Appellant,

p. 32). And further charges that the Virginia Court gave this tax a new form "merely to avoid" an adverse economic consequence to the Commonwealth and characterized the tax as a property tax "at such a late hour in the shadow of *Spector Motor Service Inc., supra*" in "an obvious resort to form." These charges are groundless.

1.

City of Richmond v. Commonwealth (1948)

The first time that a tax of this type was before the Supreme Court of Appeals of Virginia for a decision as to its nature or form was in the case of *City of Richmond* v. *Commonwealth,* 188 Va. 600, 50 S. E. 2d 654 (1948). That decision, *coming before the Spector Case had been heard of in Virginia,* clearly establishes the fact that, under our system of taxation, the localities tax the "bare bones" of the property and the Commonwealth, by means of a tax labeled a franchise tax and measured by apportioned gross receipts, reaches the "going concern" value of the property. This the Court explained by quoting from the views of two former State Corporation Commissioners.

> " '* * * It will be noted that in assessing these properties the Commission is expressly forbidden by the Constitution to include any franchise value in the assessment of the physical properties for taxation. * * *' " (188 Va. 632)
>
> * * *
>
> " 'The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company *exclusive of any franchise value, good will, "going concern value,"*

"cost of establishing the business," or other "intangible value of the company." ' " (Italics supplied). (188 Va. 624)

" '* * * In brief, the plan existing today, which is common to all such companies, provides for the imposition of *ad valorem* taxes by the several localities in the State upon the tangible properties of such companies. These taxes are imposed on the basis of assessments made or valuations fixed by the Commission. A second and integral part of the system provides that such companies shall pay a franchise tax measured by gross receipts which tax is devoted to the support of the State government. The constitutional and statutory provisions, providing for this dual method of taxing such companies, uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exclude* such franchise value as may be inherent in such property.' " (188 Va. 619)

This decision make it clear that: (1) the Supreme Court of Appeals of Virginia in the *Baltimore Steam Packet Case, supra,* was not classifying the tax in order to avoid the *Spector Case;*

(2) The "going concern value" of the corporation is not subjected to dual taxation;

(3) The system of taxation established by the Legislature under the Constitution of 1902 was designed to levy a tax on the "going concern value" of the corporation measured by its gross receipts; and

(4) The words "franchise tax" or "license tax" refer to a tax on the "going concern value" for the Court used the words "franchise value" when speaking of the "going concern value" of such corporation.

2.

Virginia Electric & Power Co. v. Commonwealth (1940)

In making its charges against the Supreme Court of Appeals of Virginia the Appellant did not see fit to call to the Court's attention the *City of Richmond Case* in spite of the fact that counsel for the Appellant were in that case allied with the Commonwealth against the position taken by the City. Instead, the Appellant asserts that "in at least one case the Virginia Court has held that the railway gross receipts tax is a *franchise tax* as distinguished from a tax on the property used to produce those gross receipts" (Appellant's Brief, p. 24). As authority they cite *Virginia Electric & Power Co.* v. *Commonwealth*, 174 Va. 316, 6 S. E. 2d 680 (1940). The point involved in that case was whether the receipts from operation of buses were a part of the gross transportation receipts taxed by the statute. The Court was not considering the *nature* or *effect* of the tax but rather was considering the *scope* of the term "gross transportation receipts." The question of whether the tax was a license or franchise tax or an *ad valorem* property tax was not before the Court. It is, therefore, *unsound* to say that the Court held that tax to be a franchise tax as distinguished from a property tax. The Court had no occasion to draw any distinction.

3.

Commonwealth v. Baltimore Steam Packet Co. (1951)

The case of *Commonwealth* v. *Baltimore Steam Packet Co., supra,* was so clearly analogous to the instant case that the appellant here filed a brief *amicus curiae* in that case.

After reviewing the principles laid down by this Court with respect to such taxes the Virginia Court considered the question of whether that tax (and, since the Appellant was

before the Court *amicus curiae* the Court also expressly dealt with the tax on express companies) was a license tax and concluded:

> "Certainly section 58-575 does not impose a license tax in the sense that its payment is a prerequisite to the right to operate vessels in the navigable waters of the United States. It does not impose a tax on the privilege of navigation. The payment of the tax is not made a condition precedent to the right to carry on the business, as was the case in *Moran* v. *New Orleans*, 112 U. S. 69, 5 S. Ct. 38, 28 L. ed. 653, and *Harman* v. *Chicago*, 147 U. S. 396, 13 S. Ct. 306, 37 L. ed. 216. It provides no criminal sanctions, but its enforcement is left to the ordinary means devised for the collection of taxes. *Postal Tel. Cable Co.* v. *Adams, supra.*
>
> "Baltimore has been paying a tax on receipts from business 'beginning and ending in Virginia' every year since 1915, but no license has ever been issued to it and the procedures prescribed in Article I, Chapter 7 of Title 58 for obtaining licenses have not been followed. 'But where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax.' *Charlottesville* v. *Marks' Shows, supra*, 179 Va. at p. 329, 18 S. E. (2d) at p. 894.
>
> "If not a license tax, is it a tax on property or the equivalent of a tax on property?" (193 Va. 68)

Turning its attention to its own question the Court said:

> "In *Richmond* v. *Commonwealth*, 188 Va. 600, 619, 50 S. E. (2d) 654, 663, the opinion of the State Corporation Commission in that case is quoted to the effect that our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of public service corporations, common to all such companies, and providing for the imposition of *ad valorem*

taxes by the several localities in the State, on the basis of assessments or valuations fixed by the Commission. 'A second and integral part of the system provides that such companies shall pay a franchise tax measured by gross receipts which tax is devoted to the support of the State government. The constitutional and statutory provisions, providing for this dual method of taxing such companies, uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exlude* such franchise value as may be inherent in such property.'

"We said in that opinion that the existing method of assessing the properties of the utility involved in that case was developed from the system prescribed for the assessment of railroad properties, and we quoted from a letter relating to railroad assessments written by Commissioner Epes, afterwards a justice of this court, saying in part:

" 'The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company exclusive of any franchise value, good-will, "going concern value," "cost of establishing the business," or other "intangible" value of the company.'

"Likewise, in the 1941 Annual Report of the Commission, page 41, it was said:

" 'Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.'

"It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their dual values, the dead value, or 'the bare bones,' to be taxed by the locality, and the live, or

going concern value, to be taxed by the State for the protection and services rendered by it. That the going concern value is thus taxable, although the basic items of property on which it arises are used in interstate commerce, is established by numerous decisions of the Supreme Court, as set out above. This tax on the going concern value is in effect an increase of the *ad valorem* rate, *Memphis Natural Gas Co.* v. *Stone, supra.* In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause." (193 Va. p. 69)

C.

THE ADMINISTRATIVE INTERPRETATION IN VIRGINIA

As has been previously demonstrated, both the State Corporation Commission (see statement of former Commissioner Epes quoted in *Baltimore Steam Packet Case, supra*) and the Supreme Court of Appeals of Virginia (188 Va. 619) have interpreted the Virginia statutes to mean that the property tax reserved to the localities must be valued with "franchise value" or "going concern value" excluded. It is clear then that this element of value in the Appellant's property is not taxed under the administrative interpretation of the statute unless it is taxed by the gross receipts tax.

Further evidence of the administrative understanding is found in the 1941 Annual Report of the State Corporation Commission where it is said:

> " 'Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.' " (193 Va. 70)

D.

THE INTENTION OF THE CONSTITUTION OF 1902

The Appellant also contends that the tax here under consideration must be regarded as an excise tax because of its similarity to the "franchise taxes" imposed on railroads. They reason that the railroad provisions were copied by the framers of the Constitution of 1902 from the Maine statute in the light of the construction placed by this Court on that statute in *Maine* v. *Grand Trunk Railway Co., supra.* They urge, therefore, that the framers of the Constitution intended not a property tax but an excise tax.

In *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217 (1908), Mr. Justice Holmes discussed the *Grand Trunk Case* and said:

> "* * * This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See Ficklen v. Taxing District, 145 U. S. 1, 23, 36 L. ed. 601, 607, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 697, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Mc-

Henry v. Alford, 168 U. S. 651, 670, 671, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242.

" 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent thereto, it is not open to attack as inconsistent with the Constitution.' Postal Teleg. Cable Co. v. Adams, supra. See New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 439, 39 L. ed. 1043, 1045, 1046, 15 Sup. Ct. Rep. 896. * * *" (28 S. Ct. 640)

We agree with the Appellant's view that our system of taxation is based on the *Grand Trunk* decision. But it is based on the interpretation placed on that decision by the *Galveston Case* that the tax imposed is a tax on the property of companies engaged in commerce. Our tax fits the pattern which Mr. Justice Holmes described in the *Galveston Case* in these words:

"* * * As the property of companies engaged in such commerce may be taxed (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876), and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. * * *." (29 S. Ct. 639)

Nor is this a new or revised theory. The Appellant could, of course, reply that, the *Galveston Case* having been decided in 1908, it is absurd for us to urge that the framers of our Constitution have followed that interpretation of the *Grand Trunk Case*, however, it is clear that the construction placed by them on *Grand Trunk* is identical with that placed on the case by Mr. Justice Holmes six years later.

The spokesman for the committee that drafted the provision had this to say:

> "It is true that there is a difference between a tax upon a franchise and a tax upon capital. A franchise tax may embrace all the capital or it may embrace only a portion of it. The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at;"
>
> * * *
>
> "I call your attention to the fact that it is our desire and hope that the Legislature will see fit to levy a system of franchise taxes by which the entire property of a corporation will be gotten at, and that it will levy a tax on the entire property. If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. Why? You know that a share of stock is not a debt. There is nobody from whom you can collect it. You are entitled to no interest on it. It is simply your title deed to your share in the corporation. It simply represents the interest which you have in this property which we propose to tax under the franchise system, if the Legislature does its duty, which we suppose it will." (Debate of the Constitutional Convention of Virginia, 1901-2, II, p. 2857).

It is also clear from this same gentleman's debate on the railroad taxes that he considered that the only way to reach the "going concern value" was through a gross receipts tax, for he said:

"As I have said, we looked around to see if we could find a principle that would do justice, and in looking around we found *that as we could not find out the material value of this property, like you find out the value of a house, we would provide for some method of estimating it, and we would leave it to the State authorities to exercise it.* We found that if we take the property at its present value, if you do not increase the assessed value of their real estate and tangible personal property one dollar, but add to it the proposed tax of one per cent, upon the gross receipts, the franchise tax, you will get in the case of the Chesapeake and Ohio road 3.31 per cent, of their gross earnings, or about three and a third per cent. In the case of the Norfolk and Western you will get 3.37 per cent, or about three and a third per cent. In the case of the Southern you will get 3.97 per cent, or, in round numbers, four per cent of their gross earnings. In the case of the Seaboard Air Line you will get 5.32 or about five and a third per cent; and as to the Atlantic Coast Line you will get 6.75 per cent of their gross earnings. We think gentlemen, that we have shown no favortism.

* * *

"I repeat that you cannot get at the value of this property like you can get at the value of my real estate. There is but one way of looking at my real estate, and that is to see what its market value is. *But you cannot ascertain the market value of a railroad bed. We could not apply, therefore, the principle that you would apply to the ordinary classes of property owned by individuals.* (Italics supplied) (Debate of the Constitutional Convention of Virginia, 1901-2, II, p. 2677).

Further, and direct, evidence of the intention and understanding of the framers of the Constitution of 1902 is found in § 170 of the Constitution. The pertinent portion of that section reads as follows:

> "The General Assembly * * * may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial or commercial corporation."

The use of the word "other" in this section is clear and unmistakable evidence that the framers of the Constitution understood a franchise tax to be a tax on the franchise value or the increased value of property because of its employment in commerce.

Likewise §§ 176 and 177 of the Constitution clearly indicate that the gross receipts tax is a tax on the property value of the franchise. Those sections are set forth in the Appendix to this brief in both their original and amended form.

Section 176 provides that the State Corporation Commission shall ascertain and assess the "value of the road bed and other real estate, rolling stock, and all other personal property whatsoever (except its franchise * * *)" in this State of each railway corporation. There follows a similar provision, including the *exception as to franchise*, regarding canal corporations. Here again the framers of the Constitution clearly regarded the franchise as property. Section 177 provides for a "francise tax" upon the gross receipts of such corporations "in lieu of all other taxes or license charges whatsoever upon the franchise." These two sections make it abundantly plain that the tax is directed at the property which is inherent in the franchise and demonstrate without doubt the constitutional understanding and intention to lay a tax on the going concern value.

E.

THE OPERATION OF THE STATUTE AS COMPARED WITH DECISIONS OF THIS COURT

In determining whether this is a license tax or a property tax it would seem that it would be helpful to examine the operation of the statute in the light of certain of the decisions of this Court just as the Virginia Court did in the *Baltimore Steam Packet Case.*

The tax in question is not made a condition precedent to the right to carry on the business, but its enforcement is left to the ordinary means devised for the collection of taxes (See § 58-554, at page 42 of Appellant's brief). The tax, therefore, meets the test of *Postal Tele. Cable Co.* v. *Adams,* 155 U. S. 688.

The important element of *Maine* v. *Grand Trunk Ry. Co., supra,* as referred to in the *Galveston Case, supra,* was:

> "* * * the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. * * * ." (210 U. S. 226)

The tax in question is a part of an identical system. Indeed, Appellants argue that such taxes in Virginia copied that system.

The tax in the *Galveston Case* was condemned because it was an attempt to reach receipts reached by another tax on the property that included going concern value, but in *United States Exp. Co.* v. *Minnesota,* 223 U. S. 335, this Court sustained the tax because it was "the only mode pre-

scribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction."

The tax involved is the only tax in Virginia that reaches going concern value.

Other taxes have been condemned because they permitted the possibility of a cumulative burden by the imposition of a similar tax on the same property by numerous states. But when, as here, the tax is "fairly apportioned to its use within the state" that vice is not present. *Western Live Stock, supra.*

In *Joseph* v. *Carter, etc., Stevedoring Co.*, 330 U. S. 422, the important aspect was that it was a tax in lieu of property taxes. Section 58-553 makes it plain that the tax here involved is in lieu of other taxes. Indeed, Commissioner Catterall in the opinion of the State Corporation Commission points out that, by virtue of § 58-553, express companies escape tax on their rolling stock (R. 32).

In *Memphis Natural Gas Co.* v. *Stone, supra,* the Memphis Natural Gas Company, a Delaware corporation, owned and operated a pipe line which ran through Mississippi from and into other states. It did not engage in intrastate commerce in Mississippi. In addition to *ad valorem* taxes, Mississippi imposed "a franchise or excise tax" based on the value of the capital used, invested or employed within the State. The levy was sustained. The court said that the State court had construed the statute as an exaction required as a recompense for the State's protection of lawful activities, and those local incidents were not the "taxable events" selected for the imposition of the *ad valorem* tax. "These local incidents were the basis for the franchise or excise tax now in controversy. No reason is perceived why Mississippi cannot exact this different tax for the same protection. It is as though the *ad valorem* rate had been increased."

It is submitted that all of the reasons for sustaining the tax in the *Memphis Case* are present here.

Finally, it should be noted that the *Spector Case* is not in point here. In that case the court did not deal with the sole question presented by this case. In the *Spector Case* the Connecticut Court held the tax to be an excise tax. This Court did not inquire into the correctness of that ruling but decided the case on the basis of the tax being an excise tax. In other words, this Court started there with a fixed decision on the very question which it must determine here. The case is clearly no authority on the question of whether the Virginia tax is a property or an excise tax.

CONCLUSION

The history of administrative and judicial decisions in Virginia together with the obvious intention of its Constitution and the practical operation of its taxing statute are such that it is clear that the tax in question is a tax upon the increased value of the Appellant's property when viewed as a going concern. Such a tax is not in violation of the Commerce Clause.

For the foregoing reasons Appellee respectfully submits that the judgment appealed from should be affirmed.

Respectfully submitted,

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Sec. 176. Assessment and taxation of railroad and canal companies.

The State Corporation Commission shall annually ascertain and assess, at the time hereinafter mentioned, and in the manner required of the Board of Public Works, by the law in force on January the first, nineteen hundred and two, the value of the roadbed, and other real estate, rolling stock, and all other personal property whatsoever (except its franchise and the non-taxable shares of stock issued by other corporations) in this State, of each railway corporation, whatever its motive power, now or hereafter liable for taxation upon such property; the canal bed and other real estate, the boats and all other personal property whatsoever (except its franchise and the non-taxable shares of stock issued by other corporations) in this State, of each canal corporation, empowered to conduct transportation; and such property shall be taxed for state, county, city, town, and district purposes in the same manner as authorized by said law, at such rates of taxation as may be imposed by them, respectively, from time to time, upon the real estate and personal property of natural persons: provided, that no tax shall be laid upon the net income of such corporations.

Sec. 177. Franchise tax of railroad and canal companies.

Each such railway or canal corporation, including also any such as is exempt from taxation as to its works, visible property, or profits, shall also pay an annual state franchise tax equal to one per centum upon the gross receipts hereinafter specified in section One Hundred and Seventy-eight, for the privilege of exercising its franchises in this State, which, with the taxes provided for in section One Hundred and Seventy-six, shall be in lieu of all other taxes or license

charges whatsoever upon the franchises of such corporation, the shares of stock issued by it, and upon its property assessed under section One Hundred and Seventy-six: provided, that nothing herein contained shall exempt such corporation from the annual fee required by section One Hundred and Fifty-seven of this Constitution, or from assessments for street and other public local improvements authorized by section One Hundred and Seventy; and provided, further, that nothing herein contained shall annul or interfere with, or prevent any contract or agreement by ordinance between street railway corporations and municipalities, as to compensation for the use of the streets or alleys of such municipalities by such railway corporations.

Constitution of 1902 (Present Form)

Sec. 176. Assessment and taxation of railroad and canal companies.

The State Corporation Commission shall annually ascertain and assess, in the manner prescribed by law, the value of the roadbed and other real estate, rolling stock, and all other personal property whatsoever (except its franchise and the non-taxable shares of stock issued by other corporations) in this State, of each railway corporation, whatever its motive power; now or hereafter liable for taxation upon such property; the canal bed and other real estate, the boats and all other personal property whatsoever (except its franchise and the nontaxable shares of stock issued by other corporations) in this State, of each canal corporation, empowered to conduct transportation; and subject to such segregation of property, if any, as is provided in section one hundred and seventy-one of this Constitution, such property shall be taxed for State, county, city, town and district purposes in the manner prescribed by law, at such rates of taxation as may be imposed by them, respectively, from time

to time, upon the real estate and personal property of natural persons.

Sec. 177. Franchise tax of railroad and canal companies.

Every such railway or canal corporation shall also pay an annual State franchise tax to be prescribed by law upon the gross receipts hereinafter specified in section one hundred and seventy-eight, for the privilege of exercising its franchises in this State, which, with the taxes provided for in section one hundred and seventy-six, shall be in lieu of all other taxes, or license charges whatsoever upon the franchise of such corporation, the shares of stock issued by it, or upon its property assessed under section one hundred and seventy-six; provided, that nothing herein contained shall exempt such corporation from the annual fee required by section one hundred and fifty-seven of this Constitution, or from assessments for street and other public improvements authorized by section one hundred and seventy; and provided, further, that nothing herein contained shall annul or interfere with or prevent any contract or agreement by ordinance between street railway corporations and municipalities, as to compensation for the use of the streets or alleys of such municipalities by such railway corporations.